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March 13, 1996

**BY HAND**

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, DC 20554


Re: MM Docket No. 92-266  
Ex Parte Presentation

Dear Mr. Caton:

Today the undersigned and Stephen P. Cunningham of ValueVision International, Inc. ("ValueVision"), discussed by telephone with Julia C. Buchanan, Lynn Crakes, and Edward C. Gallick of the Cable Services Bureau the proposals of ValueVision summarized in the attached letters.

If there are any questions concerning the above-referenced matter, please communicate with the undersigned.

Sincerely yours,

  
William R. Richardson, Jr.

Encls.

cc (By Hand): Julia C. Buchanan  
Lynn Crakes  
Edward C. Gallick

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March 13, 1996

BY HAND

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: Ex Parte Presentation  
MM Docket No. 92-266

Dear Mr. Caton:

In its letter of March 12, ValueVision International, Inc. ("ValueVision") urged the Commission to adopt relatively short time deadlines in which to negotiate leased access agreements, once the rate has been agreed to (either by formula or by a form of market negotiation). These deadlines are designed to avoid opportunities for further delays in implementation of leased access.

ValueVision believes that such deadlines afford sufficient time to complete those negotiations. In ValueVision's experience, carriage agreements can be and have been negotiated very quickly when parties are negotiating in good faith. Enclosed are one-page carriage agreements that ValueVision has negotiated with cable operators that illustrate how simple the process can be. (There is, of course, no reason why good faith negotiations as to additional terms -- if truly necessary -- cannot continue during the pendency of the 60-day period proposed in ValueVision's March 12 letter during which the operator is notifying its subscribers.)

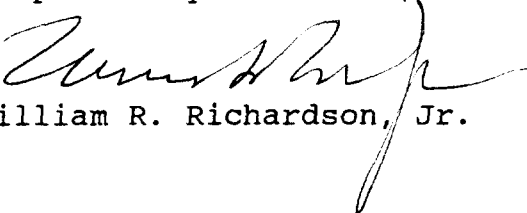
ValueVision also strongly urges the Commission not to adopt any extended transition period for implementing reforms of its current leased access rules. Such an extended period would be likely to kill leased access in its cradle, particularly given the reasonably foreseeable efforts of cable operators to ask the Commission at the end of such a transition to revisit its reforms or postpone them further. It is also unnecessary. There has already been a six-year transition period from the Commission's

1990 report to Congress urging "prompt modification" to the 1984 leased access provisions (see 5 FCC Rcd at 5046-51), and a three-year transition period from the Commission's notice that it intended to make "timely adjustments to th[e] rules." 8 FCC Rcd at 5956.

Operators and programmers have been fully aware of these decisions, the provisions of the 1992 Act, and the fact that under the Act they have been provided nothing more than the equivalent of "squatter's rights" on leased access channels. See 47 U.S.C. § 532(b)(4). Indeed, ValueVision's experience indicates that cable operators have often already bargained in their program affiliation agreements for a right of termination on short notice (e.g., 30 days). Programmers get shuffled around by cable operators whenever it suits the operator to do so, and they make appropriate adjustments in their planning to accommodate this reality. (This pattern has a very clear precedent in the industry's experience with must carry.) In sum, affected programmers have had clear notice of the requirements of leased access, and they will be afforded opportunities to make appropriate adjustments in their carriage arrangements that will be no more difficult than those they now face on a daily basis in the marketplace.

More fundamentally, however, an extended transition would be inconsistent with the specific mandate of the 1992 Cable Act for expedition in making leased access a genuine outlet for unaffiliated programmers. See 47 U.S.C. § 532(c)(4)(B). In accordance with this mandate, the Commission did not provide for any such extended phase-in of its May 1993 leased access rules -- which it believed at that time were designed to satisfy the statutory mandate to increase leased access opportunities. (Nor did Congress or the Commission employ such a phase-in for must carry. See 8 FCC Rcd 3938 (1993) (denying NCTA stay petition).) The fact that the Commission's belief has not been borne out in practice counsels even more strongly against further delaying leased access reform by relying for any additional period of time (even in part) on the now universally discredited "implicit fee" formula.

Respectfully submitted,

  
William R. Richardson, Jr.

Encls.

05-27-1992 14:15

P.31

05-27-92 13:43

# VALUE VISION

ValueVision International, Inc. 3194 West 7th Street Minneapolis, MN 55439

Stephen P. Cunningham (303) 860-1859 FAX (303) 337-0915

May 26, 1992

Dear Bob:

1. Valuevision hereby agrees to purchase the hours between 11pm and 1pm, seven days per week, on channel 8 and 50 on cable system ("System"), serving subscribers in and California for \$ per month, payable 7 days in advance, throughout the term of this agreement. These payments will total \$ for one year's carriage. VALUEVISION IS PREEMPTIBLE BY BVE, ALL PREEMPTED TIME TO BE MADE UP LATER IN CABLE CAST SCHEDULE. Affiliate agrees to promote the carriage of Valuevision during the first month of this agreement by inserting a cross-channel promotion spot, provided by Valuevision, no less than 180 times per month during this initial one month period.

3. This agreement becomes effective on June 1, 1992, the date when Valuevision launches on the system, and may be terminated by either party at any time on 30 days notice.

4. Valuevision hereby agrees to indemnify Affiliate against any and all claims arising from the content of Valuevision's programming on Affiliate's system.

VALUEVISION

*Stephen P. Cunningham*

Agreed to:

*[Signature]*

(Name of system)

# VALUE<sup>RM</sup> VISION INTERNATIONAL

6740 Shady Oak Road, Minneapolis, Minnesota, 55344

Telephone: (612) 947-5200

Fax: (612) 947-0188

Robert P. Manning  
National Director, Program Distribution  
Direct Dial: (612) 947-5242

May 31, 1995

Dear Mr.

- 1) VALUEVISION hereby agrees to purchase the hours of on channel 4; and the hours of Midnight to noon (7 days), 5p-7p & 8:30p-Midnight (Mon. & Tues.), 5p-7p & 8p-Midnight (Wed. & Fri.), and 5p-Midnight (Thurs., Sat. & Sun.) on channel 38 of the system (Affiliate) serving 62,950 subscribers in . The total unduplicated hours are 153 per week.
- 2) VALUEVISION agrees to pay Affiliate an annual fee of \$ , in equal advance monthly installments of \$ , beginning on July 1, 1995. Affiliate agrees to insert VALUEVISION- provided cross-channel promotion spots 400 times per month for the length of this agreement..
- 3) The term of this agreement is one year from July 1, 1995, but may be terminated at any time by either party with 30 days written notice. Effective July 1, 1995, this agreement supersedes all prior agreements, including the agreements dated March 21, 1994 and May 20, 1994.
- 4) VALUEVISION hereby agrees to indemnify Affiliate against any and all claims arising from the content of VALUEVISION's programming on Affiliate's system.

For Affiliate:

\_\_\_\_\_

General Manager

For ValueVision:



Stephen P. Cunningham  
SVP, Program Distribution

93-09-30 14:23

P.4

391 POC SEP 17 '93 05:47

# VALUE VISION

Valuevision International, Inc. 6184 West 75th Street Minneapolis, MN 55425 (612) 831-1407 Fax (612) 831-4870  
DENVER OFFICE: 1906 Sherman Street Denver, CO 80203 (303) 880-1898 Fax (303) 880-1899

September 16, 1993

Dear Bill,

1) Valuevision hereby agrees to purchase 24 hours, seven days per week on the cable system (Affiliate) serving subscribers on channel 58 of the system serving

2) Valuevision agrees to pay Affiliate an annual affiliate fee of \$ in monthly increments of \$ . Affiliate agrees that of all affiliation fees paid by Valuevision, 20% will be allocated for cross-channel promotion of Valuevision.

3) This agreement commences on the date of launch which is 9/16, 1993 and may be terminated after 6 months by either party with 90 days written notice.

4) Valuevision hereby agrees to indemnify Affiliate against any and all claims arising from the content of Valuevision's programming on Affiliate's system.

For :

For Valuevision:

Stephan P. Cunningham, SR VP  
Program Distribution



6740 Shady Oak Road, Minneapolis, Minnesota, 55344

Telephone: (612) 947-5200

Fax: (612) 947-0188

Arlen I. Engelson  
Account Director, Program Distribution  
Direct Dial: (612) 947-5284  
Direct Fax: (612) 947-5285

March 6, 1995

1) VALUEVISION hereby agrees to purchase the hours of 12a.m.(midnight) to 12 p.m.(noon) CST, Sunday thru Friday and 12a.m.(midnight) to 10 a.m. CST Saturday on channel 52 of the Cable system ("Affiliate") serving subscribers in in the St. Paul/Minneapolis DMA. The total hours are 82 per week.

2) VALUEVISION agrees to pay Affiliate an annual fee of \$ in equal advance monthly installments of \$, beginning on the renewal date, presently estimated to be March 1, 1995. Affiliate agrees to insert VALUEVISION-provided cross-channel promotion spots 180 times per month for the length of this agreement.

3) This agreement commences on March 1, 1995 and may be terminated by either party at any time with 30 days notice. This contract supersedes all previous contracts between stated parties.

4) VALUEVISION hereby agrees to indemnify Affiliate against any and all claims arising from the content of VALUEVISION's programming on Affiliate's system.

For Affiliate:

For ValueVision

By: \_\_\_\_\_  
Its: VP of Advertising & Programming

By: Stephen P. Cunningham  
Its: SVP, Program Distribution

# VALUE VISION

ValueVision International, Inc. 6194 West 76th Street Minneapolis, MN 55439 (612) 831-1407 Fax (612) 831-4870

Stephen P. Cunningham (303) 800-1350 FAX (303) 800-1399

Post-It® brand fax transmittal memo 7671		# of pages: 1
To: <u>Mark Payne</u>	From: <u>Cunningham</u>	
Co:	Co:	
Dept:	Phone:	
Fax:	Fax:	

AUGUST 11, 1993

1. Valuevision hereby agrees to purchase the hours between 7 and 11 seven days per week, on channel 11 on cable system ("System") serving \*\*\* subscribers for \$        per month, payable in advance, throughout the term of this agreement. These payments will total \$        for one year's carriage.

2. System agrees to promote the carriage of valuevision during the first three months of this agreement by inserting a cross-channel promotion spot, provided by Valuevision, no less than 300 times per month during this initial three month period.

3. This agreement becomes effective on August 16, 1993, the date when Valuevision launches on the System, and may be terminated by either party at any time on 30 days notice.

4. Valuevision hereby agrees to indemnify system against any and all claims arising from the content of Valuevision's programming on the System.

VALUEVISION:

Steph Cunningham

Agreed to:       

(Name of System)

\* 10pm -- 7am  
10am -- 12pm  
3pm -- 7pm

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March 12, 1996

BY HAND

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: Ex Parte Presentation  
MM Docket No. 92-266

Dear Mr. Caton:

On behalf of ValueVision International, Inc. ("ValueVision"), this letter sets forth some proposals for leased access request procedures that ValueVision believes are necessary and appropriate in order to avoid unnecessary further delays in making leased access a "genuine outlet" for unaffiliated programmers,<sup>1/</sup> and to promote the kind of "certainty" about leased access requirements that Congress sought in the 1992 Cable Act.<sup>2/</sup> These recommendations are based upon ValueVision's

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<sup>1/</sup> See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 5631, 5937 & n.1264 (1993), quoting S. Rep. No. 92, 102d Cong., 1st Sess. 79 (1992).

<sup>2/</sup> See S. Rep. No. 92, supra, at 31-32:

" . . . to be successful, a programmer may well have to be carried on many cable systems and thus have to negotiate leased access rates with many operators. Because of the uncertainty caused by [the existing] provision, a programmer would almost certainly see this as a hopeless task.

" . . .

(continued...)

experience, as documented in its prior filings in this docket and others,<sup>3/</sup> that cable operators have been very reluctant to honor leased access requests on a timely basis under the current rules.

1. As recent decisions make clear,<sup>4/</sup> the Commission's rules now require leased access rates to be made available upon request, but do not provide a time limit for doing so. 47 C.F.R. § 76.970(e). As noted in ValueVision's prior filings,<sup>5/</sup> almost 70 of the nation's largest 99 MSOs did not even acknowledge ValueVision's initial 1993 requests for leased access for months. To ensure prompt compliance, ValueVision urges that the operator be required to place its leased access rates in its public file and, as with political rate and all other information contained therein, provide copies thereof "within a reasonable period of time, which in no event shall be longer than seven days." Id. § 76.305(d). Since the operator already retains this information for Commission inspection, id. § 76.970(e), placing it in the public file subject to prompt copying at the applicant's expense involves no significant additional burden for the cable operator. Because leased access programmers (unlike political candidates, local broadcast stations, and subscribers) may often not be located nearby,<sup>6/</sup> ValueVision also urges that the Commission permit leased access rate requests to be made by mail or telecopy.

2. ValueVision also believes that the Commission should ensure that the information provided is adequate to enable

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<sup>2/</sup>(...continued)

" . . . By involving the FCC before leases are negotiated, programmers will know the parameters of an agreement, increasing certainty and the use of these channels."

<sup>3/</sup> These experiences have also been described in ValueVision's reply comments in CS Docket Nos. 94-48 and 95-61, in connection with the Commission's annual assessments of the status of competition in the market for delivery of video programming.

<sup>4/</sup> See, e.g., Karl Schroll, DA 96-286 (CSB Mar. 12, 1996) (dismissing petition alleging failure to provide leased access rates, because Comcast provided such rates two months after the filing of the petition).

<sup>5/</sup> See, e.g., Supplement to Petition for Reconsideration at 2 (Nov. 23, 1993).

<sup>6/</sup> See note 2 supra.

leased access applicants to assess the compliance of the quoted rates with the Commission's requirements. Thus, the operator's leased access rate calculations should be required to include an identification of those channels being used to calculate the rates, and a breakdown for each such channel of the current number of subscribers, the monthly local ad revenue it generates for the operator, and the monthly commissions or other fees it pays. As noted above, because these calculations would already be retained for Commission inspection, making such data available to leased access applicants would not amount to a significant burden.<sup>7/</sup>

3. If the supply of leased access time exceeds demand, ValueVision urges that the operator be required to carry each applicant within 60 days of confirmation that the applicant is willing to pay the rates previously quoted. This period is at least as generous as that provided to arrange for carriage of must carry signals and permits the operator more than adequate time to notify subscribers of the change.<sup>8/</sup>

4. The leased access programmer should be entitled, at its option, to obtain access at the specified rate for up to one year, at which time the process could begin anew (with carriage not discontinued in the interim). This procedure avoids the delays, disruption, and transaction costs to both parties from having to renew the process on a monthly basis. It would involve no financial risk to the cable operator, which may require monthly prepayment of the fee (with reasonable notice and opportunity to cure prior to cancellation for nonpayment, of the kind typically provided in traditional lease agreements).

5. ValueVision has urged the Commission to use the first-come-first-served policy that it adopted with the original leased access rules in 1992.<sup>9/</sup> If the Commission is inclined

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<sup>7/</sup> We assume that the Commission would not dismiss a leased access complaint challenging the operator's calculations simply because the complaint was based on reliable industry data rebutting these figures (e.g., trade publication reports concerning ad availabilities and commission payments being offered by the displaced cable channels).

<sup>8/</sup> Cf. Fouce Amusement Enterprises, Inc., 10 FCC Rcd 668 (CSB 1995) (ordering carriage within 30 days of release date of order); WTKK TV, Inc., 10 FCC Rcd 2732 (CSB 1995) (45 days); Cablevision Systems Corp., DA 95-2420 (CSB released Feb. 21, 1996) (60 days).

<sup>9/</sup> Petition for Reconsideration at 13 (June 21, 1993).

instead to permit market negotiation when requests for leased access time exceed the designated supply, ValueVision urges that in such cases the seven-day response to a leased access request described above should include both (a) the leased access rate calculations, and (b) a certification that the number of unaffiliated applicants that have already requested carriage exceeds the required supply. This requirement will help to ensure the prompt sale of time at the regulated rate where leased access channels exceed demand at the time of the request.

6. Under any such market negotiation approach, the operator should be given a finite period to negotiate among the various applicants for the most remunerative carriage options. ValueVision believes that, at the outset, the number of prospective applicants for leased access will not be large, and that such relatively simple negotiations (e.g., lease term and channel position) can and should be implemented within one week. Competing programmers have no desire for delay, and the rules should provide no incentive for the operator to create it.

7. In any such market negotiation process, ValueVision believes that it would be prudent to establish a rebuttable presumption of carriage for those applicants agreeing to pay the highest rates. Consistent with this presumption, such an applicant should also have a right, in the event its request is rejected, to receive carriage on the terms offered by any selected applicant that has agreed to pay less. This procedure would ensure that the operator recovers its opportunity costs fairly, and it creates disincentives for the operator to manipulate the process by selecting a less remunerative channel for anticompetitive reasons. As Congress recognized in making the 1992 Act reforms, ". . . the operator may believe that the programmer might compete with programming that the programmer owns or controls."<sup>10</sup>

8. To permit monitoring by leased access programmers of the operator's compliance with these requirements, the Commission should require the operator promptly to notify those who are refused leased access as to the identities of those who are granted access, the monthly rates they have agreed to pay, and the duration of their leases. Such information is particularly important given the recognition by Congress that the operator may well have an incentive to deny access to competitors or to condition it on unreasonable rates.

9. ValueVision is also concerned about the incentive of cable operators to deny carriage to leased access competitors

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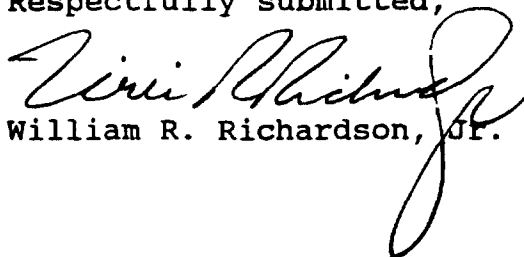
<sup>10</sup>

S. Rep. No. 92, supra, at 31.

by filling up their leased access capacity with programmers that may disappear within relatively short periods of time. If such programmers are later dropped from the system for nonpayment or any other reason, ValueVision urges that prior leased access applicants be given prompt notification and first opportunity to replace them. Of course, the Act also requires that the programmers selected for leased access must be unaffiliated with the operator, with certain limited exceptions. We would urge the Commission to enforce this requirement by reference to debt, equity, or managerial or other service relationships between leased access programmers and cable operators that could otherwise undermine this protection.<sup>11/</sup>

Thank you for your consideration of these proposals.

Respectfully submitted,



William R. Richardson, Jr.

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<sup>11/</sup> Cf. Review of the Commission's Regulations Governing Attribution of Broadcast Interests, 10 FCC Rcd 3606, 3649-53 (1995) (ongoing review of broadcast ownership attribution rules to include financial relationships).